



Between

[Redacted Name]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This matter comes before the Tax Appeals Commission (hereinafter “the Commission”) as an appeal against a determination of the Revenue Commissioners (“the Respondent”) dated 1st December 2020 made pursuant to section 485 (24) (a) of the Taxes Consolidation Act 1997 (“TCA 1997”). Within the Respondent’s determination it held that the Appellant was not a “*qualifying person*” under the Covid Relief Support Scheme (“the CRSS”) and as such was ineligible for payment supports under that scheme.
2. Since 2022, the Commission have adjudicated upon and issued Determinations in respect of a number of CRSS appeals. Those Determinations may be found on the Commission’s website¹.
3. Subject to certain conditions being fulfilled, section 949AN TCA 1997 - “*Appeals raising common or related issues*” - permits the Commission to determine an appeal having regard to a previous Determination issued by the Commission (“the similar appeal”) where the matter under appeal and the similar appeal share “*common or related issues*”.
4. Where those provisions apply, the Commission is required to send a copy of the similar appeal Determination (redacted for privacy) to the Appellant and the Respondent (“the parties”). In addition, the Commission are required to request arguments from the parties, if any, to be received within 21 days after the date of the request, in relation to why the parties, or either of them, would deem it unsatisfactory to have regard to the similar appeal Determination in adjudicating upon the matter under consideration in the parties’ appeal.
5. In accordance with section 949AN TCA 1997, the Commission wrote to the parties and enclosed a copy of a suitable similar Determination of the Commission, 98TACD2022². As neither party submitted any arguments to the Commission objecting to the Appellant’s appeal being determined in the manner proposed, this appeal is determined without a hearing and is therefore based upon the similar appeal Determination and documentation received from both parties, in accordance with the provisions of section 949AN TCA 1997.

Background

6. The Appellant is a limited liability company engaged in the trade of an education facilitator who assists international students with [REDACTED]
[REDACTED] The Appellants students who are

¹ <https://www.taxappeals.ie/en/determinations> - 73TCAD2022, 83TACD2022, 85TACD2022, 87TACD2022, 88TACD2022, 98TACD2022, 148TACD2022, 10TACD2023, 13TACD2023, 17TACD2023, 64TACD2023, 130TACD2023, 131TACD2023, 132TACD2023, 149TACD2023.

² <https://www.taxappeals.ie/en/determinations/98tacd2022-crss-covid-relief->

assisted with semester programme placements are placed in a number of Colleges and Universities which include [REDACTED] The Appellant has a registered office at [REDACTED]

7. On 17th November 2020, the Appellant registered for the CRSS via Revenue Online Services. The Respondent reviewed this application and on 1st December 2020 informed the Appellant by way of determination that its business did not appear to meet the eligibility criteria for the CRSS, specifically that it did not operate its business activities from a “business premises” as defined.
8. Subsequently, on 3rd December 2020, the Appellant replied by way of letter to the Respondents’ determination. This letter included a copy of the Appellant’s lease for their business premises.
9. Following review of the Appellant’s documentation, on 25th February 2021, the Respondent confirmed its determination to the Appellant. Within that correspondence, it stated that it deemed the Appellant was ineligible for registration under the CRSS as it did not carry on a trade that was conducted from a business premises located within a region subject to restrictions introduced in line with the Government’s ‘Living with Covid-19 Plan’, *“with the result being that the business was required to prohibit or significantly restrict customers from accessing its premises.”*
10. The Appellant who was not in agreement with the Respondent’s determination, lodged its appeal with the Commission on 22nd March 2021.

Submissions

Appellant

11. The Appellant submitted that it fulfilled the entire eligibility criteria for the CRSS but stated that the Respondent disagreed that it satisfied one of the requisite conditions. The Appellant stated this condition was that the Respondent was of the opinion that the Appellant did not operate its business from a business premises, as defined.
12. The Appellant submitted that its business activities were the providers of [REDACTED] [REDACTED] and as such were considered a “non-essential service” for the periods of Covid restrictions. The Appellant explained that while it offered courses of education that its activities did not come within the definition of “essential education services” under the relevant provisions of the “Covid legislation”.

13. The Appellant submitted as it was business activities were not considered an essential service, then it was prohibited from allowing members of the public, its teachers or its students onto its premises. The effect of this prohibition, the Appellant submitted, was that its revenues dropped in excess of █████ during the periods of Covid related restrictions.
14. The Appellant further submitted that an “open office” is crucial to the day-to-day delivery of its programs. The Appellant stated it used its office premises *“for a variety of business and service delivery activities such as but not limited to: student orientations, classes, workshops, cultural events, lectures, student presentations, business meetings, training sessions and business conferences.”*
15. The Appellant stated that its office was required to be open to the public. In explaining why it needed to be open to the public, the Appellant stated:

“People require access for the following reasons: local community members that are interested in getting involved with our programmes, █████ engaging with us or expressing interest in working with us, local businesses wanting to get involved with our students or programmes, students interested in participating in our programming, international universities visiting Ireland meeting us for business purposes and developing programmes for and the like.”
16. The Appellant submitted that it was not a “supplier to other agencies” but rather it organised and delivered its own programmes and did not “rely on or involve” universities in the provision of its programmes. Those programmes, the Appellant explained, were customised educational programmes for █████ students and the duration of those programmes typically ran from one to twelve weeks in length. The Appellant stated that its customers paid it directly for its services rather than through an intermediary.
17. In conclusion, the Appellant submitted that it satisfied the full requirements for CRSS eligibility and in particular as it was unable to remain operative during the periods of Covid restrictions, then it was required to prohibit or substantially restrict its customers from accessing its business premises. In those circumstances, the Appellant submitted that its appeal should be allowed.

Respondent

18. The Respondent submitted the burden of proof was on the Appellant to demonstrate, on the balance of probabilities, the Respondent's determination was incorrect and that the Appellant was entitled to registration under the CRSS.

19. In support of this position, the Respondent opened the case of *Menolly Homes Ltd v Appeal Commissioners & Revenue Commissioners* [2010] IEHC 49, ("*Menolly Homes*") where Charleton J held:

"The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable."

20. The Respondent stated that section 485 TCA 1997 was inserted by section 11 of the Finance Act 2020 and came into effect on 13 October 2020. The Respondent further stated that the objective of the CRSS, is outlined in section 484 TCA 1997, which it states "*is to provide a necessary stimulus to the economy to mitigate the financial consequences of the Covid-19 pandemic.*"

21. The Respondent opened section 485 (4) (b) TCA 1997 which it submitted outlines the criteria for a person to be deemed eligible for receipt of CRSS payments. The Respondent submitted that such a person must carry on a relevant business activity whose trade has been disrupted because of the:

"applicable business restrictions provisions that prohibit, or significantly restrict, members of the public from having access to the business premises in which the relevant business activity of the person is carried on ..."

22. The Respondent advised that a "business activity" was defined by section 485 (1) TCA 1997 as:

"... in relation to a person carrying on a trade either solely or in partnership, means –

(a) where customers of the trade acquire goods or services from that person from one business premises, the activities of the trade, or

(b) where customers of the trade acquire goods or services from that person from more than one business premises, the activities of the trade relevant to each business premises,

and where customers of the trade acquire goods or services from that person other than through attending at a business premises, that portion of the trade which relates to transactions effected in that manner shall be deemed to relate to the business premises or, where there is more than one business premises, shall be apportioned between such business premises on a just and reasonable basis;

23. The Respondent further opened the following definitions contained within section 485 (1) TCA 1997 -

A “business premises” which is defined as:

“in relation to a business activity, [...] a building or other similar fixed physical structure from which a business activity is ordinarily carried on”; and

“Applicable business restrictions” which are defined as:

“shall be construed in the manner provided for in the definition of “Covid restrictions period” in this subsection”; and

“Covid restrictions” which is defined as:

“restrictions provided for in regulations made under sections 5 and 31A of the Health Act 1947, being restrictions for the purpose of preventing, or reducing the risk of, the transmission of Covid-19 and which have the effect of restricting the conduct of certain business activity during the specified period.”; and

“Covid restrictions period” which is defined as:

“in relation to a relevant business activity carried on by a person means a period for which the person is required by provisions of Covid restrictions to prohibit, or significantly restrict, members of the public from having access to the business premises in which the relevant business activity is carried (referred to in this section as ‘applicable business restrictions provisions’) and is a period in which commenced on the Covid restrictions period commencement date and ends on the Covid restrictions period end date”.

24. The Respondent submitted that section 485 (4) (b) TCA 1997 applies to a person who carries on a relevant business activity and who:

“In accordance with guidelines published by the Revenue Commissioners under subsection (22), demonstrates to the satisfaction of the Revenue Commissioners that,

in the claim period, because of applicable business restrictions provisions that prohibit, or significantly restrict, members of the public from having access to the business premises in which the relevant business activity of the person is carried on –

- (I) the relevant business activity of the person is temporarily suspended, or*
- (II) the relevant business activity of the person is disrupted, such that the turnover of the person in respect of the relevant business activity in the claim period will be an amount that is 25 per cent (or less) of the relevant turnover amount...”*

25. The Respondent opened the Appellant’s Memorandum and Articles of Association which describe its activities as including:

“█████ To carry on the business of national and international education consultancy, providing type of education programmes, tuition, learning and associated services and resources, providing all types education resources, facilities, materials, and all other related activities.

█████ To engage in student recruitment agency related activities for institutions both ██████, including but not restricted to tourism related service provision and related activities.”

26. In addition, the Respondent referred to the Appellant’s website where it noted it included the following narrative:

“[The Appellant] provides assistance for persons who are studying abroad in Ireland ██████ include:

- ██████;*
- ██████*
- Application, cover letters and résumé guidance;*
- Online learning portal;*
- In country orientation and welcome event;*
- Excursion and social activities;*
- 24 /7 Country support.”*

27. The Respondent submitted it was clear from the Appellant's submissions and a review of its Memorandum and Articles of Association and website that the Appellant's business activities were those of "an educational facilitator who assists international students in securing a work placement or a college semester at [REDACTED] within Ireland." Owing to the nature of those activities, the Respondent submitted that the Appellant's customers did not ordinarily attend the Appellant's business premises to secure its services.
28. The Respondent further submitted that as the Appellant's customers are predominately [REDACTED] at the time they engage the Appellant's services, and as those customers subsequently attend organised programmes outside of the Appellant's premises, then it was no possible for the Appellant to establish that its customers were prohibited or significantly restricted from accessing the Appellant's business premises pursuant to section 485 (4) (b) TCA 1997.
29. The Respondent opened section 4.1.5 of its guidelines³ which it stated provides an insightful example of why the Appellant's business activities were deemed ineligible for support. It states:

"SurfsUp Limited carries on a trade consisting of the operation of a retail shop and a surf school in Co. Donegal. The company has a business premises in which the shop is located and from which SurfsUp Limited sells surf boards, accessories and clothing. The company ordinarily provides group surf lessons at the beach (and not from its business premises). Because of Government Covid restrictions in force for Co. Donegal, which require the company to prohibit customers from accessing its business premises, SurfsUp Limited temporarily closed its shop.

For the purposes of making a claim under CRSS, SurfsUp Limited's relevant business activity consists of its trading activities which are ordinarily carried on from its business premises, i.e. the surf shop. The scheme does not extend to business activities that are ordinarily carried on outside of the business premises (i.e. the surf lessons carried on from the beach). This is the case even if bookings for surf lessons are paid for inside the business premises.

To make a claim under CRSS in respect of its relevant business activity (the surf shop), SurfsUp Limited must satisfy the turnover conditions and other qualifying criteria (see Section 4.4). During the period of restrictions, the company's turnover from the surf

³ <https://www.revenue.ie/en/corporate/press-office/budget-information/2021/crss-guidelines.pdf>

shop was nil. In determining the amount of CRSS payments the company is eligible to claim, the company will need to determine so much of its average weekly turnover in 2019 as relates to its relevant business activity (the surf shop). For these purposes, SurfsUp Limited should apportion its total turnover from the trade between the relevant business activity (the surf shop) and the remaining part of its trade (surf lessons) on a just and reasonable basis.”

30. The Respondent submitted in applying the above example to the facts of the Appellant’s appeal, and in noting that the provision of its education facilitation takes place outside of the Appellant’s business premises and in further noting that those services are organised and paid for online, then it was apparent that there were no targeted restrictions in place that restricted the Appellant conducting its business activities from its business premises.

31. The Respondent further opened paragraph 4.2.3 of its Guidelines which states:

“There may be cases where, under the terms of Covid restrictions, customers of a relevant business activity may be restricted from accessing substantial elements of the business premises in which a relevant business activity will either be suspended or significantly disrupted. In those circumstances, provided that all other eligibility criteria are met (as outlined in section 4) in relation to the entire relevant business activity, it will be accepted that the business will be eligible to make a claim under the CRSS”

32. The Respondent submitted that the pandemic has disrupted many aspects of the day-to-day running of a business such as in person business meetings, conferences or orientations. However as these features of business do not constitute the substantial elements of the Appellant’s business activity performed on the business premises, the Respondent submitted that Appellant customers are not restricted from accessing the substantial element of the relevant business activity which is the facilitation of educational service which occur offsite and predominately online and not at the Appellant’s business premises.

33. The Respondent further submitted that Covid restrictions have not directly impacted the Appellant’s business. Rather, the Respondent submitted international travel restrictions had a serious impact on the Appellant’s business and/or it has been impacted by restrictions placed directly on its [REDACTED] and the [REDACTED] themselves. However, as those restrictions were not restrictions imposed on the services provided by the Appellant, the Respondent submitted that the Appellant was not eligible for CRSS registration as it is unable to demonstrate that as a direct result of the Covid restrictions, customers were prevented from accessing its services at its business

premises. The Respondent further submitted while the Appellant's business may have suffered a reduction in its customers as a result of domestic or international travel restrictions or the requirement to ensure social distancing, that those restrictions were not a specific restriction in establishing whether the Appellant was entitled to avail of CRSS registration.

34. In consideration of the foregoing, the Respondent submitted it was an essential requirement that the Appellant conducted its activities in a premises as defined. As it did not, and as its provided guidance specifically stated that activities akin to the Appellant's business activities were ineligible for inclusion on the CRSS, the Respondent submitted that the Appellant's appeal could not succeed.

Material Facts

35. The Commissioner found the following material facts from the documentary evidence, which were not contested by the Respondent, and are required eligibility conditions for inclusion on the CRSS:

- 35.1. The Appellant's business activities commenced before 26^h December 2019.
- 35.2. The Appellant's turnover was less than 25% of the average weekly turnover level of that in 2019.
- 35.3. The Appellant's business profits are chargeable to taxation under Schedule D, Case 1.
- 35.4. The Appellant intended to (and subsequently did) carry on business activities after the "Covid-19 restrictions" were lifted.
- 35.5. The Appellant had complied with all their VAT registration and return obligations.
- 35.6. The Appellant held a tax clearance certificate at all material times.
- 35.7. The Appellant applied for registration under the CRSS on 17th November 2020.
- 35.8. On 1st December 2020, the Respondent issued its determination notice in which it stated as the Appellant did not satisfy the necessary criteria for CRSS registration, its registration was being refused.

36. In addition, the Commissioner found the following material facts from the parties submissions:

- 36.1. The Appellant is engaged in the trade of an education facilitator who assists [REDACTED]
- 36.2. The activities conducted by the Appellant are considered non-essential educational services.
- 36.3. The Appellant further states it required the use of its office premises “for a variety of business and service delivery activities such as but not limited to: student orientations, classes, workshops, cultural events, lectures, student presentations, business meetings, training sessions and business conferences.”
- 36.4. No evidence was provided to the Commission that any of the above activities were conducted on the Appellant’s premises. In particular, the Commission were not provided with details of any courses provided by the Appellant, such as a curriculum or brochure detailing the course content.
- 36.5. The Appellant submits that its business premises are open to the public for a variety of purposes which includes the making of enquiries into the provision of student accommodation and general enquiries.
- 36.6. The Appellant maintains a website which details its provided business activities.
- 36.7. The Appellant operates part of its business activities from a “building or other physical fixed structure”.

Analysis

37. The Commissioner notes from the Appellant’s website that in addition to its management team, it employs individuals who are described as “[REDACTED]”. The Commissioner further notes that the following items are included under the “Programmes” offered by the Appellant:

- [REDACTED]
- [REDACTED]
- [REDACTED]

- [REDACTED]
- [REDACTED]
- Service learning which contains the narrative “*Students develop a deep understanding of the social context of their academic disciplines; something only possible outside a classroom.*”

38. In consideration of the totality of the Appellant’s activities and in noting that the Appellant does not appear to have any direct teaching staff employed, the Commissioner finds that the Appellant’s business activities do not require its customers to ordinarily attend its business premises. In further consideration of the noted comments in which the Appellant states it required its business premises to be open to the public, the Commissioner additionally finds that those services are incidental or ancillary to the Appellant’s business activities.

39. If the Commissioner is incorrect in his findings, he notes that it for the Appellant to prove the facts in its appeal and as the Commissioner has not been provided with any evidence to establish that the Appellant’s business activities are conducted from its business premises, he is unable to so do and must therefore find that the Appellant’s customers were not prohibited or substantially restricted in attending the Appellant’s business premises to avail of its services.

40. The Commissioner is reassured in this finding in noting from the Respondent’s provided CRSS guidelines (see paragraph 29 above), that the CRSS does not extend to business activities that are ordinarily carried on outside of the business premises. As the majority of the Appellant’s activities listed on its webpage refer to those activities being conducted outside of the Appellant’s business premises or indeed this Country, and as those activities are not eligible for CRSS support, this reaffirms the Commissioner’s finding.

41. In the similar appeal, the Appellant operated a seasonal business and its business premises consisted of a warehouse and a marquee set up on land owned by public bodies. As in the Appellant’s appeal, the central issue to be determined within the similar appeal was whether the Appellant was required as a result of applicable business restriction provisions to prohibit, or significantly restrict, members of the public from having access to its business premises which the Commissioner noted is a prerequisite for CRSS eligibility under section 485 TCA 1997.

42. Within the similar appeal, the Commissioner noted that the CRSS was introduced by the Government to provide *“targeted support for businesses directly impacted by public health restrictions with the result that they had to temporarily close or significantly restrict access to their premises”*.
43. In coming to his findings in that appeal, the Commissioner examined the “complicated” sections of section 485 TCA 1997 utilising the principles of statutory interpretation promulgated in *Perrigo Pharma International DAC v John McNamara, the Revenue Commissioners, the Minister for Finance, Ireland and the Attorney General* ([2020] IEHC 552).
44. In so doing, the Commissioner examined a number of definitions contained within section 485 (1) TCA 1997 and the Health Act 1947 (Section 31A - Temporary Restrictions) (Covid-19) (No. 10) Regulations 2020. Following that analysis, the Commissioner noted that the key phrase contained within section 485 (1) TCA 1997 was that the business was *“required by the provisions of Covid restrictions...”* to have been required to prohibit or significantly restrict members of the public from having access to the **business premises** [emphasis added]. As the Appellant in the similar appeal operated its business from a warehouse and a marquee, the Commissioner held that it did not have a business premises which it was required to prohibit or significantly restrict members of the public from having access to.
45. In considering the implications of a business not being required to restrict members of the public from having access to its business premises, the Commissioner referred to paragraph 4.2.4 of the Respondent’s CRSS guidelines which states:
- “What if a business is not prohibited or significantly restricted from allowing customers to access its business premises but its customers base has significantly reduced because of Covid-19?*
- The business must meet the requirement that it ordinarily operates from a fixed business premises and, under the specific terms of the Covid restrictions announced by the Government, customers of the business are prohibited, or significantly restricted, from accessing those business premises....”*
46. As the Commissioner held in the similar appeal, that the Appellant was not required to prohibit or significantly restrict members of the public from accessing its business premises under the specific terms of Covid restrictions, the Commissioner found that the Appellant was not entitled to avail of the provisions of section 485 TCA 1997 and hence was ineligible for payments under the CRSS. It therefore follows that as the

Commissioner has also determined that the Appellant in its appeal was not required to prohibit or significantly restrict members from accessing its business premises, then the Commissioner is required to find that the Appellant was ineligible for registration under the CRSS. Therefore, the Respondent's determination in which it held that the Appellant was ineligible for CRSS registration as it was not required to prohibit or substantially restrict its customers from accessing its business premises is upheld by the Commissioner.

47. The burden of proof lies with the Appellant. As confirmed in *Menolly Homes*, "*the burden of proof is...on the taxpayer.*" The Commissioner finds that the Appellant has not discharged the burden of proof in this appeal and finds that the Appellant has not shown that it was entitled to avail of the provisions of section 485 TCA 1997.

Determination

48. For the reasons set out above, the Commissioner determines that the Appellant has failed in its appeal and has not succeeded in demonstrating its eligibility for inclusion in the CRSS. Accordingly, the Commissioner is required to uphold the Respondent's determination in which it held that the Appellant was not entitled to registration under the CRSS as it failed to satisfy the requirements under section 485 TCA 1997.
49. It is understandable that the Appellant may well be disappointed with the outcome of his appeal but the Commissioner has no discretion to deviate from the legislation. The Appellant was correct to avail of its right of appeal and to check its legal entitlements. The Commissioner hopes the Appellant's business has recovered since the easing of Covid restrictions.
50. This Appeal is determined in accordance with Part 40A TCA 1997. This determination contains full findings of fact and reasons for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 42 days of receipt in accordance with the provisions set out in the TCA 1997.

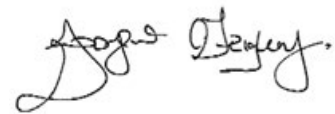
Notification

51. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ (5) and section 949AJ (6) of the TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ of the TCA 1997 and in particular the matters as required in section 949AJ (6) of the TCA 1997. This notification under section 949AJ of the TCA 1997 is being sent via digital email communication only (unless the Appellant opted for postal communication

and communicated that option to the Commission). The parties will not receive any other notification of this determination by any other methods of communication.

Appeal

52. Any party dissatisfied with the determination has a right of appeal on a point or points of law only within 42 days after the date of the notification of this determination in accordance with the provisions set out in section 949AP of the TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.



Andrew Feighery

Appeal Commissioner

14th December 2023